Supreme Court, U.S.
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No. 00-1214

In The

Supreme Court of the United States

THE STATE OF ALABAMA,

Petitioner,

v.

LEREED SHELTON,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Alabama

BRIEF AMICUS CURIAE
BY INVITATION OF THE COURT

CHARLES FRIED*
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
*By Invitation of the Court**

CYNTHIA D. VREELAND
ELIZABETH A. ROWE
JOHN S. RHEE
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Where counsel has not been afforded to an indigent defendant, does the Constitution of the United States bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, and may such a defendant be incarcerated in the event the suspension or probation is revoked?

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INTEREST OF AMICUS CURIAE

Charles Fried and Hale and Dorr LLP submit this brief pursuant to the October 18, 2001 order of this Court:

> Charles Fried, Esquire, of Cambridge, Massachusetts, is invited to file a brief, and to argue, as *amicus curiae*, in opposition to the judgment below and in support of the following position: where counsel is not afforded to an indigent defendant, the Constitution of the United States does not bar the imposition of a suspended or probationary sentence upon conviction of a misdemeanor, even though the defendant might be incarcerated in the event probation is revoked.

STATEMENT OF THE CASE

After a jury trial, in which he "did a creditable job of defending his own case," Joint App. at 33, Respondent LeReed Shelton was convicted of third degree assault, a misdemeanor carrying a maximum permissible punishment of one year imprisonment and a $2,000 fine. *Id.* at 26; *see also* ALA. Code § 13A-5 (1975). Shelton had been advised of his right to employ counsel and advised of the difficulties involved in proceeding without counsel. Joint App. at 33. He was not, however, advised that an attorney would be appointed for him if he could not afford one.[1] *Id.* The judge sentenced him to serve thirty days in

[1] At no point has Shelton made the claim that proceeding without counsel before a jury, rather than before a judge, is so inherently perilous to him that it deprived him of due process. *See Betts v. Brady*, 316 U.S. 455 (1942) (due process required

the county detention center. Resp. Brief in Opp. to Cert. at 1-2. The judge then suspended the term of imprisonment, imposing two years of unsupervised probation conditioned on the payment of court costs, a fine, reparations and restitution within thirty days. *Ibid.*[2]

The Supreme Court of Alabama affirmed the conviction but reversed the imposition of the suspended sentence:

> Having held that a defendant who receives a suspended or probated sentence to imprisonment has a constitutional right to counsel, and having found that Shelton did not intelligently and understandingly waive that right and that he suffered a deprivation of that right, we affirm Shelton's conviction but reverse that aspect of his sentence imposing 30 days of suspended jail time.

Joint App. at 40.[3]

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appointment of counsel where special circumstances of particular case indicated that indigent defendant needed lawyer to obtain fair trial), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (adopting *Betts'* case-by-case analysis for deciding whether appointment of counsel required in probation revocation hearing).

[2] Although a further condition of good conduct does not explicitly appear in the sentence of the Circuit Court, *see* Joint App. 26-27, such a condition is not unusual and was perhaps implicit in the court's sentence since probationary terms may include the avoiding of certain habits, places, persons, etc., *see* ALA CODE. § 15-22-52 (1975), and may be modified by the court at any time with or without a hearing, *see* ALA. RULES CRIM. PROC. (2001), Rule 27.2.

[3] The court based its decision on *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and its progeny. Accordingly, the decision may be

The State of Alabama petitioned this Court for a writ of *certiorari* on the following question:

> In light of the "actual imprisonment" standard established in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and refined in *Scott v. Illinois*, 440 U.S. 367 (1979), does the imposition of a suspended or conditional sentence in a misdemeanor case invoke a defendant's Sixth Amendment right to counsel?

This Court granted the writ on May 14, 2001.

In its brief on the merits, Alabama argues that a suspended sentence is a "mere threat" of imprisonment and does not implicate the right to counsel. Petitioner's *amici*, the State of Texas, *et al.*, argue to the same effect. Shelton argues both that the Sixth Amendment precludes the imposition of any conditional sentence on an uncounseled defendant[4] and, in the alternative, that *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), should be overruled and the Sixth Amendment extended to require the appointment of counsel in any case where a term of imprisonment is an authorized penalty. In its reply brief, Alabama makes clear that "the State and its *amici* accept that, under *Argersinger* and

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taken to rest on federal constitutional grounds, and not on any interpretation of state law, although some Alabama cases are also cited.

[4] The terms "uncounseled defendant" and "uncounseled conviction" are shorthand for an indigent person who was not offered counsel at government expense, or the conviction of such a person. There can be no question that the Sixth Amendment requires that in any criminal proceeding a person who wishes to be represented by retained counsel must be allowed that assistance.

Scott, a defendant cannot be actually incarcerated unless he was properly informed of his right to appointed counsel. Accordingly, there is no possibility that Shelton's suspended sentence will be activated if he violates the terms of his probation." Reply Brief at 9.

SUMMARY OF THE ARGUMENT

The question whether a conditional sentence of incarceration may be imposed on an indigent misdemeanor defendant, who has not been offered counsel, is properly before the Court. It follows that the further question, whether the defendant may be incarcerated for breach of the conditions in the original sentence, may and should also be answered. Both questions should be answered affirmatively. It makes no sense to conclude, as Alabama argues, that a conditional sentence may be imposed but may not be carried out.

The statements in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Scott v. Illinois*, 440 U.S. 367 (1979), on which Shelton and the court below relied, should properly be understood to stand for no more than the proposition that an offer of counsel is required as a predicate for a sentence of incarceration to be imposed immediately upon a misdemeanor conviction. The Court's later cases, particularly *Nichols v. United States*, 511 U.S. 738 (1994), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), confirm that the right to counsel must be evaluated separately for each proceeding, that a right to counsel in one proceeding does not necessarily entitle a defendant to counsel in

other proceedings, and that practical considerations must play a role in any further extensions of *Argersinger*.

In this case, Shelton had no right to appointed counsel at the time the conditional sentence was imposed because he was not actually imprisoned at the conclusion of that proceeding. Because the sentence was valid when imposed, the state may, without violating Shelton's constitutional rights, revoke the probation and impose the suspended sentence, if Shelton subsequently violates the conditions of the suspension.

Practical considerations confirm the conclusion that states should be allowed to revoke uncounseled conditional sentences. Experience and empirical data strongly suggest: that conditional sentences are an important tool for law enforcement and the maintenance of public order; that the utility of that tool depends on the ability of courts to carry out the threat implicit in the original conditional sentence; and that a constitutional requirement of counsel as a predicate for imposing such conditional sentences may impose unmanageable burdens and rigidities on some jurisdictions.

The constitutionally required contours of the subsequent proceeding, in which an offender may be remanded to custody for breach of the conditions in a conditional sentence, present separate issues that need not be addressed at this time.

ARGUMENT

I. Whether A State May Revoke A Conditional Sentence Is An Issue Properly Before The Court.

There are four potential solutions to the problems raised by conditional sentences of imprisonment imposed on uncounseled misdemeanor defendants: (1) The state must offer counsel whenever a term of imprisonment is an authorized penalty for the offense with which the defendant is charged.[5] (2) A conditional sentence of incarceration may never be imposed on an uncounseled misdemeanor defendant. (3) A conditional sentence of incarceration may be imposed on an uncounseled misdemeanor defendant, but the state may not subsequently enforce the sentence of incarceration if the defendant violates the conditions of the sentence. (4) A conditional sentence of incarceration may be imposed on an uncounseled misdemeanor defendant, *and*, in an appropriate revocation proceeding, the state may order his incarceration, if he violates the terms of the conditional sentence.[6] We assume that it is the fourth alternative that the Court

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[5] Alabama correctly points out that Shelton raises this possibility for the first time in his brief on the merits in this Court. *See* Resp. Brief at 27-31. The suggestion in the brief of *Amicus* National Association of Criminal Defense Lawyers that counsel must be provided "when a jail sentence of more than six months is *authorized*," Brief at 19 (emphasis in original), is a version of this alternative and would impose the same rigidities that the Court sought to avoid in *Argersinger* and later cases.

[6] In Section IV, we discuss issues concerning the procedural guarantees a state would have to provide in such a proceeding, particularly whether the defendant would have to be afforded counsel.

has asked us to brief and argue, as neither Alabama nor its *amici* defend that alternative.

Whether a state can revoke a conditional sentence, if appropriate procedures are followed, is an issue properly before the Court. If Alabama may not later impose the suspended term of incarceration for violation of the terms of the suspension unless Shelton was offered counsel at the original proceeding, the outcome would be functionally identical to a rule that conditional sentences may never be imposed on an uncounseled defendant in the first place (alternative two). Shelton essentially concedes this point:

> Probation, must, of course, carry with it the authority of the granting court to revoke and incarcerate. Without such authority probation would be meaningless and ineffective.

Resp. Brief at 17. In short, the answer to the question whether a state may impose a conditional sentence like Shelton's in the absence of counsel entails the answer to the further question whether the sentence may, after some appropriate subsequent proceeding, be carried out.[7]

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[7] Because Petitioner urges the third alternative and the Respondent the second, and because the Court's acceptance of the Petitioner's contention requires a reversal of the decision below and reinstatement of the conditional sentence of incarceration, while acceptance of the Respondent's position entails affirmance of the court below, the positions of the parties are sufficiently adverse to create a case or controversy, conferring jurisdiction on this Court. U.S. Const. Art. III, § 2. 28 U.S.C. § 1257(a).

II. The Court's Jurisprudence Confirms That A State Does Not Deprive An Uncounseled Misdemeanor Defendant Of Due Process If It Revokes A Conditional Sentence And Imposes The Term Of Incarceration.

A. The Argument That A Conditional Sentence May Not Be Imposed (Or, Alternatively, That It May Not Be Revoked) Relies On An Overly Broad Reading Of *Argersinger* And *Scott*.

Amici Texas, *et al.*, correctly and in detail set out the background and history of the Sixth Amendment's provision regarding the assistance of counsel. We agree with their conclusion that the Sixth Amendment addressed the distinct issue of a criminal defendant's right to retain and be assisted by counsel. The constitutional right to counsel only began to embrace a right to appointed counsel for indigent defendants in the 1930's, and then through the partial agency of the more flexible and amorphous concept of due process: under certain circumstances a conviction in which the defendant had no ability to procure, and thus was not assisted by, counsel did not comport with due process of law. *Betts v. Brady*, 316 U.S. 455 (1942); *Powell v. Alabama*, 287 U.S. 45, 71 (1932). In *Johnson v. Zerbst*, 304 U.S. 458 (1938), that ruling was announced as an invariable requirement of the Sixth Amendment in all federal criminal prosecutions.[8]

[8] The defendants in *Johnson* were convicted of felonies. The opinion does not expressly limit the holding to felonies. *See* 304 U.S. at 463 ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives

Gideon v. Wainwright, 372 U.S. 335 (1963), incorporated *Johnson v. Zerbst* into the Fourteenth Amendment, applying that rule to the states.

Shelton's strongest argument for the position that Alabama may not impose a conditional sentence in cases such as this is based not on the Sixth Amendment itself but on the language in two leading cases, *Argersinger* and *Scott*:

> "[N]o person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger*, 407 U.S. at 37.
>
> "The denial of the assistance of counsel will preclude the imposition of a jail sentence." *Id.* at 38.
>
> "The run of misdemeanors will not be affected by today's ruling. But in those that *end up* in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary where one's liberty is in jeopardy." *Id.* at 40 (emphasis supplied).
>
> "Even were the matter *res nova*, we believe that the central premise of *Argersinger* – that *actual imprisonment* is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of

the assistance of counsel.") Several lower courts subsequently held, however, that there was no right to appointed counsel in "petty" misdemeanor cases punishable by less than six months imprisonment. *Argersinger* overruled these cases and applies to both state and federal misdemeanor proceedings.

actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott*, 440 U.S. at 373 (emphasis supplied).

From these statements Shelton reasons that, if an uncounseled misdemeanor conviction may never "end up" in actual imprisonment – even by the route of the later imposition of a suspended sentence – then it follows that a state may not impose such a conditional sentence in the first place. Resp. Brief at 17. Alabama bases its position that it may not revoke Shelton's conditional sentence on the same language. Reply Brief at 9.

Shelton and Alabama read too much into this language. In neither case did the Court have before it the issue presented here. In *Argersinger*, the defendant had been sentenced to a term of incarceration directly upon his conviction, *Argersinger*, 407 U.S. at 26, and the case addressed only that circumstance. And in *Scott*, the defendant received only a $50 fine although a sentence of imprisonment of up to one year was authorized for the offense (shoplifting) with which he had been charged. *Scott*, 440 U.S. at 368. The Court addressed and rejected Scott's contention that he was entitled to appointed counsel because a sentence of imprisonment was authorized, even if it was not imposed. *See id.* at 373 n.4. Accordingly, the language from those two cases, even if it could bear the construction Shelton puts on it, was not only dictum but perhaps inadvertent dictum at that.

B. The Court's Later Decisions Confirm That The Right To Counsel Must Be Determined Separately For Each Proceeding, And That Practical Considerations Are Relevant In Establishing The Limits Of The *Argersinger* Principle.

The decisions in *Nichols v. United States*, 511 U.S. 738 (1994), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), confirm that the Court has no intention of pushing *Argersinger* to the limit of its logic.

In *Nichols*, the Court held that an uncounseled misdemeanor conviction, valid under *Scott*, may be relied on to enhance a prison sentence for a subsequent offense. *Nichols*, 511 U.S. at 746-47. The uncounseled misdemeanor conviction led to a 25 month increase in the prison term for the second offense. *Id.* at 741. The Court nevertheless concluded, as a "logical consequence" of *Scott*, that the uncounseled conviction could be considered in the later sentencing proceeding. *Id.* at 746. Any other result would "create [ ] a 'hybrid' conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution." *Id.* at 744 (*quoting Baldasar v. Illinois*, Powell, J., dissenting, 446 U.S. 222, 231 (1980)).[9]

In *Gagnon*, the Court ruled that counsel was not necessarily required at a probation revocation hearing, even though revocation of probation would result in the

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[9] In *Baldasar*, the court held that an uncounseled conviction that did not result in a sentence of imprisonment could not be used to increase a later sentence under a repeat offender statute. However, the 5-4 decision in *Baldasar* had no majority rationale. The *Nichols* Court agreed with the dissenters in *Baldasar*.

re-imposition of a 15 year prison sentence. 411 U.S. at 780, 790-91. The right to counsel in such a proceeding instead would depend on a balancing of factors particular to the relevant case:

> [W]e think that the Court of Appeals erred in accepting respondent's contention that the State is under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases. While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel.
>
> . . . .
>
> . . . [D]ue process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.

411 U.S. at 787-89 (footnotes and citations omitted).

These cases confirm two important principles:

First, the extent of the right to appointed counsel must be determined separately for each proceeding. Thus, in *Nichols*, the defendant was not entitled to appointed counsel at the time of his original misdemeanor conviction because he was not sentenced to prison at that time. The conviction was valid when imposed, and the fact that it had been uncounseled did not undermine its validity in a later proceeding in which it was used to enhance the prison sentence on the defendant's conviction for a subsequent offense. 511 U.S. at 746-47. Similarly, in *Gagnon*, although the defendant presumably would have been entitled to counsel at the time

of his original plea (he pled guilty to a felony), he was not necessarily entitled to counsel at the subsequent probation revocation hearing. 411 U.S. at 790-91.

Second, considerations of practicability and the severity of the burden on actual defendants must play a role in any further extensions of *Argersinger*. As the Court stated in *Scott*:

> [W]e conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger* – that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment – is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.

Scott, 440 U.S. at 373 (footnotes omitted). Accordingly, in *Argersinger*, the Court decided that states must offer appointed counsel only to those misdemeanor defendants whose cases result in immediate actual imprisonment. *Argersinger*, 407 U.S. at 40. And in *Gagnon*, the Court held that states must offer appointed counsel at probation revocation hearings only in those cases where the need for counsel outweighs the costs and collateral disadvantages. *Gagnon*, 411 U.S. at 790.

C. Shelton Had No Right To Appointed Counsel At The Time The Conditional Sentence Was Imposed.

As demonstrated by Alabama and its *amici*, Shelton did not have a right to appointed counsel at the time of his original trial because the judge determined that he would not be actually imprisoned at the conclusion of that proceeding. The threat of incarceration implicit in the conditional sentence imposed upon him could only mature into actual confinement if Shelton later chose to violate the conditions of the suspension, as determined in a subsequent proceeding. In this respect the case is analogous to *Nichols*, in which an additional term of imprisonment was brought about by Nichols's subsequent criminal conduct. Nor is Shelton's argument sound that a conditional sentence is itself such a deprivation of liberty as to require the appointment of counsel. *Argersinger* makes clear that it is only actual incarceration that requires the appointment of counsel and not any lesser imposition.

D. Because Shelton Had No Right To Appointed Counsel At The Time The Conditional Sentence Was Imposed, Alabama May Revoke The Conditional Sentence Without Violating Shelton's Constitutional Rights.

Because Shelton's sentence was valid at the time it was imposed, Alabama may revoke the conditional sentence without violating Shelton's constitutional rights.

The "actual imprisonment" standard, established in *Argersinger*, is not retroactive. The right to counsel must

be capable of being ascertained at a particular point in time. As *Nichols* and *Gagnon* confirm, the relevant point of inquiry, in this case, was the time of Shelton's original conviction. Because Shelton's sentence was valid at the time it was imposed, it remains valid even if, through his own subsequent conduct, he "ends up" in prison because of the revocation of his probation. The Court observed in *Nichols* that enhancement statutes, such as those at issue in *Nichols*, "do not change the penalty imposed for the earlier conviction." 511 U.S. at 747. The same is true here. Even if Shelton's probation is subsequently revoked, the original sentence was, and remains, a conditional sentence.

Even Shelton concedes that "[p]robation must, of course, carry with it the authority of the granting court to revoke and incarcerate. Without such authority probation would be meaningless and ineffective." Resp. Brief at 17. Having complied with the Constitution in obtaining a conviction against Shelton, Alabama should have the accompanying power to revoke the suspended sentence if Shelton fails to comply with its terms.

Shelton will have only himself to blame if, at some later point in time, he is incarcerated for violating these terms. Contrary to Shelton's argument, Resp. Brief at 2, he would not be in the same position as a defendant immediately imprisoned at the time of conviction. Any such defendant would surely acknowledge the significant difference between being able to return home after sentencing and being incarcerated forthwith upon conviction.

In short, the uncounseled conditional sentence is valid when imposed because it does not result in actual incarceration in that proceeding. And being valid it may serve as a proper predicate for incarceration in a later proceeding, if the defendant violates the conditions of suspension. As the Supreme Court of Illinois stated in a case in which a defendant had received an uncounseled conditional sentence on conviction of misdemeanor battery and was subsequently incarcerated for breach of the conditions in that sentence:

> We are mindful that resentencing, after probation has been revoked, is on the original conviction and not on the act which served as the basis of the violation. Thus, in the instant case, the jail sentence was imposed upon the battery convictions. Nonetheless, a conviction valid at the time it was entered, based on a sentence of probation, is not retroactively invalidated by the imposition of a jail term following the revocation of the defendant's probation. For the defendant knew, when he was sentenced to probation, that violation of its terms and conditions could end up in his confinement. In other words, when a defendant is placed on probation, it is he alone who holds the keys to the prison gates during his probationary period.

People v. Lynn, 102 Ill. 2d 267, 276-277, 464 N.E.2d 1031, 1036 (1984) (internal citations omitted).[10]

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[10] There is very little case law concerning the authority of a court to revoke conditional sentences in light of *Argersinger*. In addition to *Lynn*, in *United States v. Nash*, 703 F. Supp. 507, 510 (W.D. La. 1989), the Western District of Louisiana determined that it could revoke the defendant's probation, even though he had not received counsel at the time of the underlying conviction, because the court "must retain the authority to enforce compliance with the terms of probation" and because "the term of imprisonment [would result] not from the original charge, but rather from Nash's violation of the terms of his probation." At least three courts have relied primarily on the language in *Argersinger* and *Scott* in concluding that the revocation of probation and imposition of a suspended sentence violated the defendant's right to counsel because it resulted in actual imprisonment. *See, e.g., Shayestah v. City of South Salt Lake*, 217 F.3d 1281, 1284 (10th Cir. 2000); *United States v. Foster*, 904 F.2d 20 (9th Cir. 1990); *Ramirez v. State of Texas*, 486 S.W.2d 373 (Tex. Crim. App. 1972).

Alabama in its Reply seeks to detach the premise from its logical conclusion by arguing that while the conditional sentence is valid when imposed, the State may not subsequently lift the suspension and impose the term of imprisonment. In Alabama's view this position is saved from incoherence because, although a state may not imprison an uncounseled defendant for a violation of a conditional sentence, the sentencing court may treat such a breach as a contempt. Reply at 11.[11] We see no substantial difference between that response to the defendant's breach and the remand to prison under the original sentence. Both responses treat the original suspended sentence as the predicate for a subsequent term of incarceration, imposed in a later proceeding. The remand to prison under the original sentence is simply the more

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[11] Alabama also suggests that the breach of conditions may be met by imposing a term of *supervised* probation. *Ibid.* Of course, this only postpones the day of reckoning. What is the court to do if the defendant violates the terms of his supervised probation?

usual and straightforward response to the defendant's breach.

III. Practical Considerations Confirm The Conclusion That States Must Be Entitled To Revoke Conditional Sentences.

A. The Available Statistics Suggest That States Rely On Conditional Sentences In A Large Number Of Misdemeanor Cases, And That Only A Small Percentage Of These Cases "End Up" In Actual Incarceration.

As stated in *Scott*, in deciding whether to extend the rule of *Argersinger*, the Court will take into consideration what is "reasonably workable," and what may "impose unpredictable, but necessarily substantial, costs on 50 diverse states." 440 U.S. at 373. Any workable solution to the issues raised by this case must take into account the large number of misdemeanor cases filed each year, and the need to process these cases as efficiently as possible. A recent study by the National Center for State Courts suggests that more than 8.7 million misdemeanor cases were filed in state courts in 1999.[12] The greatest proportion of these cases are what must be considered minor

[12] See "Examining the Work of State Courts, 1999-2000" National Center for State Courts, Court Statistics Project, available at http://www.ncsc.dni.us/divisions/research/csp/csp-index.html. This report indicates that 4,924,710 cases were filed in courts in general and unified jurisdiction, and 9,279,112 caes in courts of limited jurisdiction, in 1999. 12% of the cases filed in courts of general jurisdiction were misdemeanors, while 88% of those filed in courts of limited jurisdiction were misdemeanors.

matters: petty thefts, motor vehicle offenses, minor altercations between acquaintances that somehow got out of hand, and other low level trouble-making. Trivial as these may seem viewed individually, taken together they assume great significance: the peace and good order of our communities depend on the maintenance of the norms such conduct offends. *See* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996).[13] The offenses must of necessity be adjudicated in volume and with a certain informality, or they will be ignored altogether at significant cumulative cost to society. Often they will be prosecuted not by lawyers but by the peace officers who intervened or apprehended the offender in the first place. Offenders who might be able to afford counsel may not think it worth the expense. Indeed, the statistics cited by *amici* Texas, *et al.*, suggest that nearly 40% of misdemeanor defendants choose to forego counsel, even when offered court-appointed counsel, and that fewer than 20% hire private attorneys. *Amici* Brief at 24-25.

[13] "[D]isorder and the fear it generates are serious problems that warrant attention in and of themselves. Disorder demoralizes communities, undermines commerce, leads to the abandonment of public spaces, and undermines public confidence in the ability of government to solve problems; fear drives citizens further from each other and paralyzes their normal, order-sustaining responses, compounding the impact of disorder. Restoring order is key to revitalizing our cities, and to preventing the downward spiral into urban decay that threatens neighborhoods teetering on the brink of decline, regardless of whether a reduction in crime results." *Id.* at 242.

The available data, although sparse, confirms that states rely on conditional sentences in a significant percentage of these misdemeanor cases. Shelton cites statistics from the Bureau of Justice Statistics indicating that, in each of years 1996 through 1999, between 1.4 million and 1.8 million adults were on probation for misdemeanors. Resp. Brief at 18-19. A newly-released report from the same source states that more than 1.7 million adults were on probation for misdemeanors in the year 2000.[14]

The data further suggests that, although conditional sentences are frequently imposed, only a small percentage of uncounseled misdemeanor defendants are ultimately incarcerated for breaching the terms of a conditional sentence. Of those who had not received counsel in their original trial, the Bureau of Justice Statistics states that, in the summer of 1997, 2,607 persons confined in state prisons had previously been on probation and were confined for something other than a new offense (*i.e.*, for violating the terms of their probation).[15]

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[14] *See* Bureau of Justice Statistics, U.S. Dept. of Justice, Press Release (Aug. 26, 2001). The Bureau of Justice Statistics reports calculate separately the total number of adults on probation, and the percentages of those probationers on probation for non-felony offenses. In 2000, more than 3.8 million adults were on probation, and 46% of those probationers were on probation for a non-felony offense.

[15] Some jurisdictions (including our own Commonwealth of Massachusetts) make counsel available in all misdemeanor cases or in all cases in which a sentence of imprisonment is authorized; others do not. *See* the Appendix to the Brief of *Amici* Texas, *et al.*, which does not allow a definitive count of how each jurisdiction approaches the issues in this case, but does display a variety of approaches among the states.

Bureau of Justice Statistics, U.S. Dept. of Justice, Survey of Inmates in State and Federal Correctional Facilities (1997). It may be inferred that, by virtue of *Argersinger*, these were all or almost all misdemeanor offenders. The number of uncounseled misdemeanants incarcerated for breach of the conditions of their sentences is likely to be higher, because the study does not include persons confined in county jails, lock-ups and the like. Further, these statistics only give the number of persons confined at a particular moment of time. Because the terms on remand are often likely to be quite short, the number who have been confined in the course of a year will be larger. The study confirms, however, what already seems clear from the statistics provided by both Shelton and Alabama: only a small percentage of uncounseled misdemeanor defendants "end up" in prison for the breach of a conditional sentence.[16]

These numbers also are consistent with the Court's observation in *Gagnon* that, because the purpose of the probation system is rehabilitative rather than punitive, conditional sentences are revoked only as a last resort:

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[16] Shelton cites some information from the Bureau of Justice Statistics indicating that, in each of years 1996 through 1999, between 266,000 and 272,000 probationers were reincarcerated for violating the terms of their probation. Resp. Brief at 19. As Shelton points out, however, these figures include both misdemeanor probationers and felony probationers. *Id.* Similarly, Shelton's statistics concerning the percentages of probationers who had their probations terminated in 1997 and 1998 include both terminations for violations of probation conditions and those for new crimes. *Id.* at 20.

> Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail.

Gagnon, 411 U.S. at 778 (*quoting* F. Remington, *et al.*, Criminal Justice Administration, Materials and Cases 910 (1968)).

B. Practical Considerations Weigh Against Requiring Counsel In Every Case In Which A State Wants To Impose (And Potentially Enforce) A Conditional Sentence.

Because statistics are not kept in a way that would allow a firm conclusion as to the dimensions of the burden a change in the law would impose, one can say with certainty only that to require a uniform regime of appointed counsel in all misdemeanor cases, or in all cases in which a term of incarceration is authorized, or even only as a condition for imposing a probated or suspended sentence of incarceration, would "impose unpredictable, but necessarily substantial, costs on 50 diverse states." *Scott*, 440 U.S. at 373.

Such a regime may also substantially limit the states' ability to impose what is now a critical tool of law enforcement in low level cases. These offenses threaten the good order of our communities but often do not seem to justify the harshness and disruption in a defendant's life that even a short term of incarceration may entail.

Conditional sentences are important tools in this intermediate range of cases. The shoplifter, motor vehicle offender, or disorderly person may be a familiar denizen of the misdemeanor or magistrate's court. After several warnings and perhaps fines, the court may conclude that it must get the offender's attention in some more vivid way and put teeth into its order by credibly threatening the citizen with jail time if he or she does not follow the conditions of the sentence. Such conditions may include restitution, as they did in this case, attending counseling sessions, or staying away from certain persons or places.

Depriving the courts of this important tool, or allowing it only at the cost of requiring appointed counsel in every case in which a state may want to impose (and potentially enforce) a conditional sentence, would impose a rigidity in the name of the Constitution that some courts and jurisdictions at least could not bear. The practical considerations clearly weigh against such a requirement.

IV. The Character Of The Probation Revocation Hearing Is Best Resolved In Later Cases.

We have argued that the Court should address and answer affirmatively the question whether an uncounseled misdemeanant on whom a conditional sentence had been imposed may in a subsequent proceeding be remanded to custody for breach of the conditions in that sentence. We do not believe, however, that the Court need go on to consider whether and when the Constitution requires that the misdemeanant be offered counsel in that subsequent proceeding and what issues may be raised in

that proceeding. The first question is necessarily implicated in the case before the Court. Because Shelton has not violated and may never violate the conditions in his sentence, the latter set of questions are entirely hypothetical.

Moreover, misdemeanor probation revocation proceedings typically take place so far below the statistical and scholarly radar that we are not now in a position to offer the Court any information about current practices and the difficulties in those practices. How frequently do states offer counsel in such cases? Should counsel be required if the original conviction was uncounseled? Would the open-ended nature of such proceedings take into account that the initial proceeding had been uncounseled? Should counsel appearing for the first time in a revocation proceeding be given some scope to question the underlying conviction? The Court ruled in *Gagnon* that some minimal process must be provided in a probation revocation proceeding, but that there was no general constitutional requirement for appointment of counsel, given the informality of the proceedings. That ruling, however, was in the context of a felony conviction in which the Constitution requires there to have been counsel at the time of conviction.

These specific issues are better considered in cases that squarely pose them.

CONCLUSION

For these reasons, the decision of the Supreme Court of Alabama should be reversed.

Respectfully submitted,

CHARLES FRIED*
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
*By Invitation of the Court**

CYNTHIA D. VREELAND
ELIZABETH A. ROWE
JOHN S. RHEE
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000